No. 5740

IN THE 12

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

J. B. ELDRIDGE,
Solicitor for Appellant.

Filed....., 1929.

.....Clerk.

AL KENNARD PRESS

No.....

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

J. B. ELDRIDGE,
Solicitor for Appellant.

Filed....., 1929.

.....Clerk.

INDEX

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

After a careful examination of appellees' brief we feel that we should point out the many mistakes and errors therein in a very short reply.

Appellees urge that the supplemental bill was not germane to the original bill and argue such at length.

An examination of the amended bill in equity in the original case sent up as an exhibit discloses in

paragraphs 13 and 20 that it was alleged that the project was incomplete and an inadequate water supply provided for.

An examination of the amended and supplemental answer of the Land & Water Company discloses a denial of the allegations in paragraphs 13 and 20 of the amended bill and alleges on page 14 the acceptance by the State of the canal and diversion works and on page 35 alleges ample supply of water for the whole project and works to carry it, which raises the direct issue of whether or not adequate works and water supply had beeen furnished.

An examination of the supplemental bill discloses the violation of the Federal decree in that the project had not been completed as provided for in the decree and that an adequate irrigation works and water supply was not furnished and the prayer asked that the works be completed conforming to the decree and injunctive relief against further sale of water rights. (Pages 66 and 67, Tr.).

The court's attention is invited to the case of Vinyard vs. North Side Canal Company, et al (274 Pac. Advance Sheet No. 5, page 1069), wherein is found a decision by the Supreme Court of the State of Idaho holding and deciding that there is a shortage of 155,000 acre feet in an average year on the second and third segregations of the North Side project alone. A reading of that decision by the highest court of the State of Idaho will disclose the deplor-

able condition from the standpoint of the water supply on the North Side project. This fully supports and sustains McClung, a settler on said project, and the supplemental complainant in this cause, in his charge of bad faith against the state officers and the North Side Canal Company and the Land & Water Company in permitting further sales of Canal Company stock and agreeing that such sales could be made without violating the settlers' contracts, and the Federal decree.

How anything could be more germane to the original action is inconceivable to us. Germane means closely allied, related to, pertaining to.

City of Chicago v. Reeves, 77 N. E. 237.

State ex. rel., Thompson v. Major, 123 N. W. 429.

Webster's International Dictionary.

Nothing better illustrates the many errors and mistakes in respondents' brief than the following assertion:

> "The Dietrich decree said nothing about the completion of the system. It could not do so for the system was admittedly incomplete." (Apellees' brief, page 19).

Now let us turn to the Dietrich decree and see what it says and in the opening paragraph we find the court decreed:

> "That the construction company shall complete its irrigation system in accordance with

the terms and conditions of its existing contracts with the State of Idaho." (Page 74 Tr.).

Counsel says on page 18 of their brief:

"That to be a proper supplemental bill the the source of the rights of the complainant must be the former decree; that the complainant must be able to say to his adversary here is my decree, your acts are in violation of that and this decree has already been settled in my favor."

That is just our position. Judge Dietrich said:

"This system shall be completed according to the State contract and that no more than 170,000 shares representing a like number of acres can be sold unless it can be done without violating the settlers' contracts. (Page 76 Tr.).

McClung in his supplemental bill says the project was not completed so as to serve more than 163,000 acres and that to sell more shares would be to violate the settlers' contracts. (Page 59 Tr.).

But we are told on page 12 of appellees' brief that the Federal Court provided that the Construction company might bring a suit in any court of competent jurisdiction to determine its right to sell further water rights and that because the court made no such provision for the settlers to bring a suit that they have no remedy (pages 12 and 13, appellees' brief).

This is a strange doctrine that any court could, or would try to deprive a settler or any one else from

asserting an action or right in court because that court made no provision that the person might do so; it is a revolutionary doctrine unheard of in law and yet that is just the position of appellees here.

To further render the brief of appellees untenable it is argued on page 11 that because the Commissioner of Reclamation accepted the system as completed and authorized additional sales that the water user is bound by that fact, though McClung says in his supplemental bill that such action or acceptance and approval was the result of a wrongful and unlawful conspiracy between the Commissioner of Reclamation and the Land & Water Company and the Canal Company, yet it is argued no remedy exists, and McClung further alleges that only recently did he discover any attempt to sell further stock though the contract for the sale had been made for some time.

Another inconsistency appears in appellees' brief at the top of page 13, referring to McClung:

> "He does not allege that the parties have violated the decree—of course if they had the appellant would have his remedy of proceeding against them for contempt of court."

Now turn to the supplemental bill as follows:

> "That the present capacity of the irrigation system furnished by said Land & Water Company for said North Side Canal Company is not sufficient to permit of the delivery of the

amounts already contracted to be delivered to settlers by said Land & Water Company; that the dependable operating capacity of the system is not more than 3360 second feet and there is a water loss of 40 per cent of making deliveries through said system; and that 3360 second feet of water if available in the system will only furnish and deliver the contract amounts of water to 163,080 acres under said State and settlers' contracts now outstanding."

"That the said Twin Falls North Side Land & Water Company, defendant herein, is offering to sell 15,000 shares of stock more representing water for use on 15,000 acres additional lands to be irrigated from the said water supply, and to be irrigated from the canal system belonging to the lands of the North Side project as aforesaid, which are wholly and notoriously inadequate to furnish water, therefor *in that said system has never been completed in conformity with said decree* and that further sale of additional shares of stock and water rights to additional lands as is now proposed and threatened by defendant, Twin Falls North Side Land & Water Company as aforesaid, *and in violation of said decree*, will cause great and irreparable injury to your supplemental complainant and all others similarly situated." Pages 58, 59 and 60 Tr.

ANOTHER ACTION PENDING

The amended bill in equity in the original case was an action for a cancellation of the State contract or for its specific performance as an examination will disclose. The separate amended answer of the Land & Water Company at page 3 alleges that the action is one for specific performance and this is true. When we turn to the prayer of the supplemental bill we find the only relief sought is an injunctive order to restrain further sales and that the project be completed according to the Federal decree without any mention whatever of the fraudulent contract entered into July, 1921, for the sale of further rights. No relief whatever is asked against that contract in this case. The affidavit of E. A. Walters and all the proceedings in the case by McClung in the State court for cancellation of the fraudulent contract for the sale of water rights have no connection with, and are not germane to the original case at all and are brought into this case by the defendants themselves and not by the supplemental complainant McClung, save and except for the purpose of advising the court of the method that was selected by the co-conspirators to avoid and *violate said decree* while pretending to comply with it. Examine the prayer of the State case, interposed as an objection and being urged here as an objection as shown by the exhibits sent up to this court is as follows:

"WHEREFORE, plaintiff prays and demands (a) that this court issue its order to show cause to said defendants and fix a time and place certain when said defendants shall be required to appear before this court and show cause, if any they have, why they, their attorneys and agents, should not be temporarily restrained and enjoined from selling any additional water rights or the rights to the use of water upon said Twin Falls North Side project, and why said defendants should not be restrained and enjoined from selling any of the stock of said North Side Canal Company, Limited, or any additional rights whatsoever in any manner whatsoever upon said North Side project in excess of one hundred seventy thousand acres;

(b) That upon the return and hearing of said order to show cause said defendants be temporarily restrained and enjoined from selling any additional water rights upon said North Side project in excess of one hundred seventy thousand acres, or any additional stock in said North Side Canal Company, Limited;

(c) That upon the final hearing of this cause said defendants be permanently restrained and enjoined from selling any additional water rights for any lands upon said North Side project in excess of one hundred seventy thousand acres, and be permanently restrained and enjoined from selling any additional stock in said North Side Canal Company, Limited;

(d) That said contract bearing date the 27th day of July, 1921, by and between Twin Falls

North Side Land & Water Company and North Side Canal Company, Limited, W. G. Swendsen, Commissioner of the Department of Reclamation of the State of Idaho, and North Side Pumping Company, be surrendered up for cancellation and that said contract, by order of this court be cancelled and held for naught;

(e) That plaintiff have such other and further relief as to the court may seem just and equitable."

Now the prayer of the supplemental bill is as follows:

"Wherefore supplemental complainant prays:

First. That an order of this court be issued permitting supplemental complainant to file his supplemental bill herein.

Second. That defendant, Twin Falls North Side Land & Water Company be restrained and enjoined permanently from the sale of any further water rights to be supplied under said State and settlers' contracts, out of the water supply available at the time said decree was entered and restrained and enjoined from the sale of any further water or water rights to be carried through said canal as now constructed.

Third. That Twin Falls North Side Land & Water Company be required to complete said irrigation system in conformity with said contracts.

Fourth. That if the court shall find it expedient and necessary, that the court appoint a party to take charge of said irrigation works

and complete the same at the expense of said Twin Falls North Side Land & Water Company, so as to make possible the delivery of the contracted amounts of water for 170,000 acres to the end that the settlers' contracts shall not be violated.

(Here Equity Rule 8 is invoked).

Fifth. That if it be deemed necessary for the bringing in of North Side Canal Company, Limited, a corporation, then an order to that effect be entered and said North Side Canal Company, Limited, be made a party defendant herein and that an order for process and service be issued accordingly.

Sixth. That your supplemental complainant and those similarly situated have such other and further relief as to the court may appear just in the premises. (Pages 67 and 66, Tr.).

An examination of the case shows not only that the issues are different but that the parties are entirely different, hence the case does not fall within the rule as follows:

> "If you should set up in abatement a suit pending, the plea should show, first, same parties; second, same cause of action; third, whether the case is pending in law or equity; fourth, the same relief sought; fifth, the state of the pleadings in the other court. If not strictly within these rules, the plea should be overruled."
>
> Griswold v. Bacheller, 77 Fed. 857.

Green v. Underwood, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429.

Simpkins Federal Practice, page 679."

Thus we see that the State action should not be permitted to be set up in opposition to filing the supplemental bill.

It has been suggested that the State of Idaho is a necessary party because in the first instance before the water is appropriated the States own the water. This argument is without any merit whatsoever and will be apparent to the court from a mere reference to it.

It is also argued that relief cannot be granted McClung because Judge Dietrich did not retain jurisdiction. This is another novelty.

STATUTE OF LIMITATIONS

It is urged that the statute of limitations of the State has run against the right of McClung to ask for the enforcement of a decree.

An action under a supplemental bill is not an action on a judgment as contemplated by the statutes of limitation and they have no application.

Bashor v. Beloit, 20 Ida. 592.

Green v. Houser, 9 M. Y. S. 660.

The proceeding is just a continuation of the old case.

Simpkins Federal Practice, Revised Edition, p. 635 and numerous cases therein cited.

The logical sequence of such an argument is that no one could receive the benefits of a decree rendered in his favor or enforce it by supplemental bill or otherwise if the court rendering the decree did not retain some sort of jurisdiction for further action in the premises.

It was shown in the opening brief that a court never loses jurisdiction to enforce its decree.

ADJUDICATION ON THE MERITS

We contend that the court did adjudicate the application to file the supplemental bill on the merits for in speaking of the right to sell 185,000 acres the court said:

> "The right was there given to the defendant company to sell and keep sold 185,000 shares of the capital stock of the Canal Company. So the provisions of the decree of the original action in that respect was complied with when the parties interested agreed to allow the company to sell and dispose of the 15,000 shares of the stock in addition to the stock then sold and outstanding." (Page 46 Tr.).

Again the lower court said:

> "By entering into this agreement they took the steps prescribed in the decree and thereby removed the necessity of bringing an action in this court to determine the question involved here." (Page 48 Tr.).

This is a complete determination for the lower

court decided from what had been done there was no necessity of filing the supplemental bill.

Again the trial court said:

> "There is no dispute as to the execution of the agreement referred to. It would seem that at the present time there is no question under the decree to be adjudicated as the parties have agreed in the manner directed in the decree." (Page 49 Tr.).

Again on the same page the court said:

> "North Side Canal Company representing its stockholders among whom was the Supplemental Complainant McClung and his predecessor in interest *complied with the decree* by entering into the agreement allowing the defendant company to sell the additional 15,000 shares of stock in question and asserted therein that there was a sufficient water supply and that the canal system was adequate to divert it."

Can it be said that the court did not determine those matters on the merits? McClung never agreed to further sales. Page 65 Tr. par. XXI.

Quoting from the court further beginning at the bottom of page 49 Tr., we find:

> "The further request in the proposed bill that the defendant company be required to complete the irrigation system is answered by the provisions in the decree and the agreement of the parties entered into in July, 1921."

We find the lower court saying point blank that the decree of Judge Dietrich has been complied with

and not violated. The following discussion by the court on the merits of the agreement of July, 1921, as a reason why the court did not permit the filing of the supplemental bill which said agreement in the second supplemental bill was alleged by McClung to be fraudulent and executed as a result of a conspiracy for the sole purpose of avoiding the decree of Judge Dietrich while pretending to comply with it, and yet in the face of that contention set forth in the supplemental bill, the trial court decided that this agreement made in fraud was a compliance with the decree of Judge Dietrich, and for that reason the supplemental bill should not be allowed to be filed.

Again the court quotes at length from the fraudulent agreement of July, 1921, as follows:

> "Whereas said work of canal enlargement and improvement has been completed including an increasing right in the Milner Diversion Dam by means of which about 500 second feet of additional water can now be diverted into said canal system and whereas it has been determined and ascertained by the parties hereto and so agreed that said irrigation system and the present water supply therefor can without violating the terms or provisions of the settlers' contracts irrigate 185,000 acres of land."

Then as a further quotation from the contract the court said:

"This requirement of the decree was recognized and admitted by the parties as we find in the clause quoted from the agreement." (Pages 50 and 51 Tr.).

"It further appears that the system was on August 6, 1920, accepted as completed according to the contract by the State and for and on behalf of the North Side Canal Co." (Page 52 Tr.).

Again the lower court indulged an absolute finding upon the merits as a further reason why the supplemental bill should not be allowed to be filed, although it was alleged by McClung that the acceptance and the agreement was the result of a fraud upon him and those similarly situated by Commissioner Swendsen and the Land & Water Company and the North Side Canal Company.

Then finally the court said that the controversy between McClung, a stockholder of the North Side Canal Company, the defendant company and the State, was not germane to the original bill or decree.

Here is where we think the lower court took the wrong view and clearly erred for in the second supplemental bill it was clearly set out that the fraudulent acts of the Commissioner of the Reclamation and the Land & Water Company and the Canal Company were the result of a scheme to violate the original decree of the Federal Court and necessarily related to it, and was the very means whereby the original decree of the Federal Court was rendered

nugatory and ineffective and used that method to thwart the judgment of the court and deprive McClung of the benefits to be derived from that decree. McClung plead these facts for the purpose of showing the scheme and the methods just how and the manner in which the decree of the Federal Court was violated to his injury.

These are the reasons why the trial court erred in adopting its former decision so fully quoted from, as a reason for denying the second motion to file a supplemental bill. For the trial court to accept a contract made as a result of an unlawful conspiracy to violate a decree of court as a reason why a supplemental bill should not be allowed to be filed while that bill charges such contract as sounding in fraud, bad faith and unlawful conduct seems to us to be an abuse of discretion and we urge that the cause be sent back with instructions to the trial court to permit McClung to file his supplemental bill and hear the matter on its merits.

Respectfully submitted,

J. B. ELDRIDGE,

Solicitor for Appellant.